BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA K. BOLDRIDGE Claimant	)	
VS.	)	
WAL-MART Respondent	)	Docket No. 1,021,172
AND	)	
AMERICAN HOME ASSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the April 21, 2005 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The litigated issue at the preliminary hearing was whether claimant suffered an accidental injury arising out of and in the course of her employment with respondent. The Administrative Law Judge's (ALJ) Order appointed Dr. Kenneth Wertzberger as claimant's authorized treating physician. Implicit in that decision is a finding that claimant suffered accidental injury arising out of and in the course of her employment with respondent.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment. Respondent notes claimant had a preexisting condition in her right knee and a history of her knee giving way causing her to fall. Respondent argues claimant admitted she fell at work simply because her knee gave out. As a consequence, respondent concludes claimant's fall was due to a personal condition and is not compensable. Respondent further argues that claimant's current condition and need for treatment is the result of a subsequent intervening accident claimant suffered in a fall at home when her right knee again gave out.

Conversely, claimant argues that although she had a previous injury to her right knee she had not had problems with her knee and had worked for respondent for a year before the accident at work. Claimant further argues she struck her foot on a pallet at work, her knee gave out and she fell causing her injuries. And as she continued working

her right knee condition worsened. Lastly, claimant notes that medical treatment was recommended by respondent's occupational physicians before the fall claimant suffered at her home. Accordingly, claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant suffered a fall at work injuring her right knee. She notified her supervisors of the accident and was later referred to an occupational physician. Medical treatment was recommended but respondent denied the claim before the treatment was provided. As a result, claimant sought treatment on her own.

The claimant described the accident at work in the following manner:

> Q. I'd like to direct your attention to October 30, 2004, a date that we claimed you got injured. Would you tell the judge what you were doing and how you were injured.
>
> A. Okay. It was close at the end of the shift. I was putting a pallet of stock freight on the shelves and it was a box of oil and I lifted it completely, put it in there, had no problem. I backed away from it, my right foot hit the back of a pallet and I took a step and on the floor I went.
>
> Q. Now, when you say on the floor you went, you mean you fell?
>
> A. Yes.[1]

The claimant fell forward landing on her right knee on the concrete floor. On cross-examination the claimant was questioned regarding her previous work-related injury to her right knee and the problem she had at that time with her knee giving out. She testified:

> Q. You also described to Dr. Prostic that you had giving way in your knee; is that correct?
>
> A. Yes.
>
> Q. What do you mean by giving way at the knee?
>
> A. Just be walking and fall, just - -
>
> Q. For no reason?

[1] P.H. Trans., at 5.

A. That's right. That's what happened at Wal-Mart.[2]

The claimant was further questioned about her description of the accident in a discovery deposition where she had indicated that her leg just gave out while working. She testified:

> Q. Now, after you performed this task you testified at the deposition that you fell because your knee just gave out; is that correct?
>
> A. Yes.[3]

The claimant then described a fall at her home approximately three or four weeks after the accident at work. Finally, claimant agreed that she did not trip on the pallet at work and had instead hit the back of the pallet with her right foot and then had taken a step and fell.

On re-direct the claimant testified that until the October 30, 2004 accident she was not having any problems with her right knee and since that accident her condition had continued to worsen as she continued to work. She then again explained the accident in the following fashion:

> Q. Okay. Now - - and, in fact, you were asked if your knee just gave out. You were actually stepping off the pallet and your foot came up against another pallet and that's when you fell; is that right?
>
> A. No, it wasn't on no pallet.
>
> Q. When you stepped off?
>
> A. I was on the floor. I was walking on the floor. There wasn't much space because there's pallets, there's a pallet here and there's a pallet here and it's - - I was in the middle of it (indicating).
>
> Q. So you're walking between two pallets?
>
> A. Yes.
>
> Q. And your foot, your right foot --
>
> A. Yes.

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[2] *Id.* at 15.

[3] *Id.* at 19.

Q. - - struck one of the pallets?

A. That's correct.

Q. And that's when you fell?

A. That's correct.[4]

As previously noted, the claimant sought medical treatment after respondent denied her claim and refused to provide additional medical treatment. Ultimately, she was referred by her physician to Dr. Wertzberger who opined the accident at work caused her need for additional medical care.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

Respondent argues the claimant's fall was the result of a personal condition unrelated to her work. Consequently, respondent argues the accidental injury is not compensable.

In this case, the claimant had a history of an injury to her right knee which had resulted in laxity in her knee causing her to fall. But claimant testified that this condition had improved and she no longer had such problems with her knee until the incident at work on October 30, 2004. And the claimant was able to perform her job duties for respondent without problems for a year before the accident occurred.

Although there was testimony which indicated that claimant's right knee gave way, the cause for the knee giving out was the fact that claimant struck her foot on a pallet at work. The claimant has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment.

Respondent next argues claimant's current need for medical treatment was caused by an intervening accident which she suffered in a fall at her home.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers

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[4] *Id*. at 25-26.

[5] K.S.A. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

compensation turns on whether claimant's subsequent fall at home aggravated, accelerated or intensified the underlying disease or affliction.[7]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[8], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[9], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[10], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[7] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[9] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[10] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*[11], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig* rather than *Stockman*. Claimant's right knee condition, while improved, had not completely resolved. Although claimant had been released to her regular duties claimant testified she continued to experience problems and her knee condition was worsening as she continued working. And while it appears her condition initially worsened after the fall at home, the claimant was again able to return to work the same as before the fall at her home.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds that claimant's condition did arise out of her employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's Order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[12]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated April 21, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2005.

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[11] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[12] K.S.A. 44-534a(a)(2).